Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(6) (6)

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)
ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER
Counsel of Record
66 Forest Street
Hartford, CT 06105
TELEPHONE: (203) 525-9191

DATED: December 29, 1988

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

1. Does the Twenty-First Amendment to the U.S. Constitution sanction the State of Connecticut's Liquor Control Act including its amended beer affirmation provisions?

2. Are Connecticut's amended beer affirmation provisions constitutional, on their face and as applied, under the Commerce Clause of the U.S. Constitution?

3. Does the Connecticut beer affirmation statute prevent arbitrary price discrimination by legislating equitable pricing policies within the State of Connecticut in harmony with both the Twenty-First Amendment and Commerce Clause of the U.S. Constitution?

PARTIES

The parties in this action are as follows:

Appellants

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.

Appellees

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the States of Massachusetts, New York and Rhode Island:

Anheuser-Busch Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 7

SUMMARY OF ARGUMENT 11

ARGUMENTS:

I. THE TWENTY-FIRST AMENDMENT TO THE U.S. CONSTITUTION SANCTIONS CONNECTICUT'S LIQUOR CONTROL ACT INCLUDING BEER AFFIRMATION PROVISIONS 15

II. CONNECTICUT'S AMENDED BEER AFFIRMATION STATUTE WITHSTANDS SCRUTINY UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION 20

III. CONNECTICUT'S BEER AFFIRMATION STATUTE IS IN HARMONY WITH BOTH THE TWENTY-FIRST AMENDMENT AND THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION 34

CONCLUSION 39

TABLE OF AUTHORITIES

Cases: **Page(s)**

Bacchus Imports, Ltd., et al. v. Dias, Director of Taxation of Hawaii, 467 U.S. 263 (1983) . . . 14, 15, 16

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 17, 24

Bowman v. Chicago & Northwestern R. Co., 125 U.S. 465 (1888) 14

Brown-Forman Corporation v. Tennessee Alcoholic Beverage Comm'n., 860 F.2d 1354 (6th Cir. 1988) 24–25, 27

Brown-Forman Distillers v. N.Y. State Liquor Authority, 476 U.S. 573 (1976) . . . . . *passim*

California v. LaRue, 409 U.S. 109 (1972) 16

California v. Washington, 358 U.S. 64 (1958) 16

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 16

Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311 (1917) 14, 15

Craig v. Boren, 429 U.S. 190 (1976) 17

CTS Corp. v. Dynamics Corp. of America, 107 S.Ct. 1637 (1987) 12, 20, 29

Daybrite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 19–20

Duran v. Salem, Inc., 422 U.S. 911 (1975) 16

Exxon Corp. v. Maryland, 437 U.S. 117 (1978) 25

Ferguson v. Skrupa, 372 U.S. 726 (1963) 20

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 17

Hodel v. Indiana, 452 U.S. 314 (1980) 19

Home Tel. & Tel. Co. v. Los Angeles, 211 U.S. 265 (1980) 19

Hostetter v. Idlewood Liquor Corp., 377 U.S. 324 (1964) 16

Indianapolis Brewing Co. v. Liquor Comm'n., 305 U.S. 395 (1939) 16

In re Rahrer, 140 U.S. 545 (1891) 14

Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority, No. 84-7168 (2d Cir. 1984) 17-18

Joseph E. Seagram & Sons, Inc. v. Hostetter, 284 U.S. 35 (1966) . . . . . *passim*

Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) 16

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 20

Leisy v. Hardin, 135 U.S. 100 (1890) 14

License Cases, 5 How. 504 (1847) 14

Mahoney v. Joseph Trinar Corp., 304 U.S. 401 (1938) 16

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Minnesota v. Cloverleaf Creamery Company, 449 U.S. 456 (1981) 26

New York State Liquor Authority v. Bilanca, 452 U.S. 714 (1981) 16

Nippert v. Richmond, 327 U.S. 416 (1946) 15

Norfolk Southern Corp. v. Oberly, 822 F.2d 38 (1987) 19

Philadelphia v. New Jersey, 437 U.S. 617 (1977) 32

Pike v. Bruce Church, 397 U.S. 137 (1970) 11, 22, 26-28, 33, 38

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 26, 29

Southern Pacific Co. v. Arizona, 335 U.S. 761 (1945) 29

State Board of Equalization v. Young's Market Company, 299 U.S. 59 (1931) 16, 17

324 Liquor Corp. DBA Yorkshire Wine & Spirits v. Duffy, et al., 479 U.S. 335 (1987) 14, 15, 18

United States Brewers Association v. Healy, 532 F.Supp. 1312 (D.Conn.), *rev'd*, 692 F.2d 275 (2d Cir. 1982), *aff'd per curiam*, 464 U.S. 909 (1983) ..... *passim*

United States Brewers Association v. Healy, 669 F.Supp. 543 (D. Conn. 1987), *rev'd*, 849 F.2d 753 (2d Cir. 1988) ..... *passim*

United States v. Frankfort Distilleries, 324 U.S. 293 (1945) 15

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

United States v. Hill, 248 U.S. 420 (1919) 14

Vance v. Bradley, 440 U.S. 93 (1979) 20

Walling v. Michigan, 116 U.S. 446 (1886) 14

Zifferin, Inc. v. Reeves, 308 U.S. 132 (1939) 16

Constitutional Provisions and Statutes:

U.S. Const., Art I. Sec. 8, cl. 3 . . . . . *passim*

U.S. Const., Amend. XXI, Sec. 2 . . . . . *passim*

Conn. Gen. Stat. Section 30-63 . . . . . *passim*

Conn. Gen. Stat. Section 30-63b(b) 2, 4, 7, 22

Conn. Gen. Stat. Section 30-63b(e) 5, 22, 23

Conn. Gen. Stat. Section 30-63a(b) 2, 3, 7

Conn. Gen. Stat. Section 30-63c(b) 2, 4–5, 7

Conn. Gen. Stat. Section 30-63(c) 5–6

138 M.G.L.A. Section 25B(b) 28

N.Y. Alco. Bev. Cont. Law Section 55-b(2) 28

Regulations:

7 Reg. Conn. Agencies. Liquor Cont. Section 30-6-B4a 23

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,

v.

THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellants.

v.

THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in ____ F.2d ____. The earlier opinion of the United States District Court for the District of Connecticut is reported in 669 F. Supp. 543.

JURISDICTION

This case is an appeal from a judgment of the United States Court of Appeals for the Second Circuit entered on June 13, 1988, which reversed the Ruling and Final Judgment of the United States District Court for the District of Connecticut dated September 15, 1987. The District Court had granted, pursuant to Fed.R.Civ. 56, Appellants' Motion for Summary Judgment, and had denied Appellees' Cross-Motion for Summary Judgment, by holding that the Connecticut beer price affirmation provisions contained within the Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63(b) and 30-63c(b), do not violate the Commerce Clause of the United States Constitution, U.S. Const. Art. I, Section 8, cl 3.

On Appeal, the United States Court of Appeals for the Second Circuit reversed and remanded the matter on June 13, 1988, finding that the Connecticut beer price affirmation statute, on its face, violated the Commerce Clause of the United States Constitution. A Notice of Appeal was filed by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. in the U.S. Court of Appeals in New York, New York, on July 7, 1988. A copy of this Notice is attached hereto in Appendix C at page ____.

The jurisdiction of the Supreme Court to hear this case on direct appeal rests upon 28 U.S.C. Sec. 1254 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const., Art. I, Sec. 8, cl. 3

THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., Amend. XXI, Sec. 2

THE BEER PRICE AFFIRMATION PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. State. Sec. 30-63a(b)[1]

---

[1]Conn. Gen. Stats Section 30-63a(b) was ruled to be repealed by implication in a Declaratory Ruling by the Connecticut Department of Liquor Control. See Healy II, ____F.2d____, App. A, p. ____.

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63b(b)

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered at the time of posting by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "actual cost of delivery" shall mean those expenses incurred by such manufacturer or out-of-state shipper in delivering the item of beer to the wholesaler from the point of origin to the point of destination, the term "point of origin" shall mean the location which has been established through course of dealing as the geographic location from which the wholesaler has been charged by the manufacturer or out-of-state shipper for costs of transportation, notwithstanding the fact that the item of beer may have been manufactured or bottled at, or shipped from, a different geographic location, the term "point of destination" shall mean the location which has been established through course of dealing as the geographic location at which the

wholesaler takes delivery of the item of beer, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits of each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes and packages, approved by the Department of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63c(b)

THE PRICING PROVISIONS ALLOWING OUT-OF-STATE CHANGES:

This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

Conn. Gen. Stat. Section 30-63b(e)

THE POSTING PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted

shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery.

Conn. Gen. State. Section 30-63(c)

STATEMENT OF CASE

This case involves Appellees' challenge of the constitutionality of certain price affirmation provisions of the State of Connecticut's Liquor Control Act. Appellees are collectively both a trade association now known as the Beer Institute (an industry-wide association of thirty-nine domestic brewers and twenty-three importers of beer, formerly the United States Brewers Association, Inc.), and individual brewers and importers, some of whom are licensed as out-of-state shippers to sell beer to wholesalers in the State of Connecticut. Appellants are Commissioners and the Secretary of the Connecticut Department of Liquor Control and the Wine & Spirits Wholesalers of Connecticut, Inc., an association of seven companies that are licensed to sell alcoholic liquor on a wholesale basis in the State of Connecticut.

The beer price affirmation provisions of the State of Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b), and 30-63c(b) were first enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. In 1984, the Connecticut General Assembly amended the State's beer price affirmation provisions in Public Acts 84-332 and 84-432. The declared purpose and ultimate result of Public Act 84-332 was to conform Connecticut's beer price affirmation provisions to the U.S. Supreme Court standard as enunciated in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 284 U.S. 35 (1966), and as modified by the U.S. Court of Appeals Second Circuit's decision in *U.S. Brewers Association v. Healy*, 692 F.2nd 275 (2d Cir. 1982), affirmed per curiam 464 U.S. 909, (1983) (hereinafter, "*Healy I*").

Rather than requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute simply requires that at the time of posting the "prices charged to Connecticut wholesalers are *no higher than the lowest price then being charged in any border state*". [emphasis added] *Healy II* at 547.

The Commissioners of Connecticut's Department of Liquor Control, by affidavit and Declaratory Ruling issued pursuant to Conn. Gen. Stat. Section 4-176, have further restricted the State's beer affirmation provisions. The Ruling made clear that whatever the interpretation of Section 30-63a(b), out-of-state shippers, in this case brewers, need only affirm that at the time of posting in Connecticut (and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states.

The beer industry in Connecticut consists of three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. A participant at any of the levels must hold a valid Connecticut license to sell within the State alcoholic beverages to the tier below, and ultimately to the consumers. *Healy II* at 545-46.

Appellee licensees have contended that prices charged in package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets in Connecticut and its three bordering states. However, realistically with respect to interstate "competition," in practice there is no appropriate vehicle for a wholesaler in one state to compete against a wholesaler in another state due to the nature of the national liquor distribution system under the Twenty-First Amendment and more particularly the three-tier system established independently by Connecticut and its three border states.

Moreover, Connecticut retailers, particularly near its borders, face substantial competition from retail beer outlets in the bordering states. Prices charged to Connecticut wholesalers are neither the highest nor the lowest in the four-state region. Nevertheless, as a result of higher wholesale prices, retail prices have been historically higher in Connecticut and many Connecticut residents have therefore purchased beer at lower retail prices by travelling to New York, Massachusetts or Rhode Island. *Healy II* at 546.

Beer sales in the states bordering Connecticut are regulated differently, although no less stringently, than those in Connecticut. Although there has been no evidence or argument in any of the three proceedings previously brought by Appellees relative to the comparative stringency of liquor laws in Connecticut as opposed to its bordering states, there are certain provisions in the border states that are considerably more stringent than similar provisions in Connecticut.

The fact that those licensees who choose to do business in any of the fifty states under the Twenty-First Amendment must conform to the criteria established to become a licensee in each state is the backdrop against which this litigation has proceeded. Connecticut's affirmation provisions are significantly less restrictive than those in so-called "control states" where the state is in charge of importation, wholesaling, establishment of prices and distribution. Moreover, the sale of alcoholic liquors under the Twenty-First Amendment is a privilege and not a right. Court of Appeals in *Healy I.*

On July 25, 1984, Appellees filed a challenge in the United States District Court for the District of Connecticut to contest certain provisions of Connecticut's Liquor Control Act as revised by the state legislature in accordance with the decision in *Healy I.* In their complaint, Appellees alleged that the statute violated the Commerce Clause.

On August 30, 1984, Appellants answered and filed a Motion for Summary Judgment, noting that the revised Connecticut statute was drafted in accordance with the decision of the District Court of Appeals in *Healy I.*

Appellees opposed Appellants' Motion For Summary Judgment and filed a Cross-Motion For Summary Judgment on February 23, 1985.

On September 19, 1984, the Wine & Spirits Wholesalers of Connecticut, Inc., filed a motion to intervene in the District Court action, based on the fact that the beer price affir-

mation provisions challenged by the Appellees were substantially similar in language and effect to Connecticut's affirmation provisions pertaining to alcohol and spirits. Said motion to intervene was granted and subsequently on February 13, 1985, Intervenor-Appellants filed a memorandum in support of Appellants' Motion For Summary Judgment.

On September 11, 1987, the District Court granted Appellants' motion for summary judgment and denied Appellees' motion for summary judgment. Appellees filed a notice of appeal on October 13, 1987.

On June 13, 1988, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court. A Notice Of Appeal was filed by Appellants John F. Healy, et al on June 29, 1988 and by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. on July 7, 1988.

SUMMARY OF ARGUMENT

Connecticut enacted its beer affirmation statute pursuant to Section 2 of the Twenty-First Amendment which grants the states clear authority to regulate the times, places and circumstances under which liquor may be sold. In addition to the clear delegation of authority to the states evidenced by the language of the Twenty-First Amendment, both the history and purpose of this constitutional provision provide a compelling indication of legislative intent to confer upon the states the power to regulate trade in liquor. It is also well established that a state retains broad regulatory powers under the Twenty-First Amendment, including those to absolutely prohibit the importation or distribution of liquor within its borders. The Twenty-First Amendment created an exception to the normal operation of the Commerce Clause. Connecticut's beer affirmation provisions were enacted pursuant to an express delegation of power to the states under the Twenty-First Amendment. The Twenty-First Amendment cannot be argued away.

As a legislative enactment, the Connecticut statute is entitled to a presumption of validity. Moreover, courts should exercise an appropriate level of judicial restraint in analyzing the wisdom and utility of a state statute, particularly in light of the Twenty-First Amendment. The Court should not sit as a super legislature to weigh the wisdom of legislation.

The Court should also give appropriate deference to judicial precedent as established in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The New York statute upheld in *Seagram* was far more restrictive and onerous than the Connecticut statute. In *Seagram*, under circumstances similar to this case, the Court found that the Appellant's claims of economic harm were conjecture and speculative. *Seagram* is stare decisis and for the reasons stated in *Seagram*, the Connecticut statute should be upheld.

Connecticut's beer affirmation statute is constitutionally valid on its face. The amended Connecticut statute only requires that out-of-state shippers post their prices for the following month and that the price at the moment of posting in Connecticut is no higher than the lowest price offered to

wholesalers in any of Connecticut's border states. A price change in any state subsequent to posting in Connecticut is not a violation of Connecticut law.

Under the first prong of the *Pike v. Bruce Church*, 397 U.S. 137 (1970) test, the Connecticut statute passes constitutional scrutiny in that price changes in border states do not constitute a violation of Connecticut law. In contrast to the New York ABC law struck down in *Brown-Forman*, Connecticut's beer affirmation law does not regulate prices in other states. Furthermore, the Connecticut statute does not discriminate in favor of in-state economic interests over out-of-state interests because Connecticut has no in-state brewers. In short, the Connecticut statute does not regulate or discriminate against interstate commerce.

The Connecticut statute is constitutional as applied in that it places only incidental and indirect burdens on interstate commerce. The statute survives challenge under the second prong of the *Pike* test which balances local benefits derived from the statute against the indirect or incidental burdens on interstate commerce. Connecticut maintains legitimate state interests and purposes served by its affirmation statute. Insignificant and indirect extraterritorial effects will not invalidate a statute under the Commerce Clause. *See Healy II*, 669 F.Supp. 543; *Brown-Forman v. Tennessee Alcoholic Beverage Comm'n.*, 860 F.2d 1354 (6th Cir. 1988).

Even if market distortions in buying patterns or pricing exist as a result of the Connecticut statute, Appellees have never demonstrated any quantifiable economic injury despite countless opportunities to do so. The evenhanded operation of the Connecticut affirmation statute and resulting local benefits clearly outweigh any incidental or speculative burdens on interstate commerce.

The amended Connecticut affirmation statute eliminates all but incidental extraterritorial effects. Although the brewers are free to change prices in any other state at any time, the

Second Circuit Court of Appeals found that the Connecticut statute interferes with the brewers' ability to set prices in some of the bordering states due to interaction with regulatory restrictions in those states. Connecticut has done all that it can to eliminate any extraterritorial effects of its affirmation statute by explicitly permitting price changes in other states. This is consistent with the Court's ruling in *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

In attributing extraterritorial effects to the Connecticut statute based upon its interaction with other states' liquor regulations, the Second Circuit in effect affixed the operation of other state statutes to the Connecticut statute. Not only does this "through the looking glass" analysis impose impermissible extraterritorial effects of other states' statutes upon Connecticut, but this reasoning also encourages the anomalous, but perhaps unintended, result of legitimizing legislation based upon the principle of "first in time, first in right." Connecticut maintains a plethora of legitimate state interests to regulate the distribution of alcohol within its borders, not the least of which is to insure that its wholesalers, retailers and consumers be treated equitably by receiving prices for alcoholic beverages similar to those received by counterparts in neighboring states.

Connecticut's beer affirmation statute is in harmony with both the Twenty-First Amendment and Commerce Clause. The Twenty-First Amendment has mandated the creation of fifty state liquor markets established along geographical boundaries. Within this framework of fifty "artificial" state markets, the brewers without appropriate state regulation would be in a position to fix prices on a state-by-state basis.

Under the guise of espousing free market competition, the brewers have attempted to turn both the Commerce Clause and Twenty-First Amendment on their head and instead institutionalize state-by-state price discrimination along geographical state borders. In effect, the brewers wish to coronate themselves as self-regulating price dictators in an otherwise heavily regulated liquor industry, effectively sanc-

tioning the subsidization of lower prices in one state "market" by charging higher prices in another state "market".

Connecticut's affirmation statute avoids the institutionalization of this inherently inequitable price discrimination. The brewers have never put forward a tenable explanation of why Connecticut wholesalers, retailers and consumers charged higher prices for liquor than their counterparts in less concentrated markets in neighboring states. Connecticut wholesalers, having traditionally been charged higher prices than their neighboring counterparts, have been clearly victimized by this price discrimination.

Connecticut's affirmation statute eliminates the institutionalization of unjustifiable privilege for wholesalers protected by statewide pricing laws in "privileged" states, which contain certain highly concentrated markets. The laws in those states mandating statewide prices for the distribution of alcoholic beverages arguably have impermissible extraterritorial effects through the institutionalization of artificial price subsidization by consumers in "non-privileged" states. In contrast, as a valid expression of Connecticut's legislative authority under the Twenty-First Amendment, the Connecticut affirmation statute insures evenhanded competition consistent with the spirit of the Commerce Clause. In short, the Connecticut statute is in harmony with the Twenty-First Amendment's Commerce Clause of the U.S. Constitution.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT TO THE U.S. CONSTITUTION SANCTIONS CONNECTICUT'S LIQUOR CONTROL ACT INCLUDING BEER AFFIRMATION PROVISIONS.

A. History and Purpose of the Twenty-First Amendment.

The second section of the Twenty-First Amendment provides that "the transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." In addition to the clear delegation of authority to the states evidenced by the aforementioned language, both the history and purpose of the Twenty-First Amendment provide a compelling indication of legislative intent to confer upon the states the power to regulate trade in liquor. *324 Liquor Corp., DBA Yorkshire Wine & Spirits v. Duffy, et al.*, 107 S.Ct. 720 (1987), (hereinafter *324 Liquor*).

Prior to the adoption of the Twenty-First Amendment, there was an intricate and lengthy history of state and federal legislation respecting intoxicating liquor and resulting litigation under the commerce clause, *Bacchus Imports, Ltd. et al. v. Dias, Director of Taxation of Hawaii, et. al.*, 467 U.S. 263, 281 (1983); *See also United States v. Hill*, 248 U.S. 420 (1919); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917); *In re Rahrer*, 140 U.S. 545 (1981); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Walling v. Michigan*, 116 U.S. 446 (1886); *License Cases*, 5 How. 504 (1847), *overruled, Leisy v. Hardin, supra*.

Prior to adoption of the Twenty-First Amendment, the commerce clause had effectively prevented states from unilaterally banning the local sale of intoxicating liquors from out of state. *Leisy v. Hardin*, 135 U.S. 100 (1890). Nonetheless, Congress acting pursuant to its plenary power under the commerce clause, essentially conferred that authority back to the states and the Supreme Court upheld that exercise

of congressional power. *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917).

The Eighteenth Amendment, ratified in 1919, prohibited the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, and expressly conferred concurrent power to enforce the prohibition on Congress and the several states. Section 1 of the Twenty-First Amendment, ratified in 1933, repealed the Eighteenth Amendment. However, the constitutional authority of the states to regulate commerce in intoxicating liquors did not revert to them until the passage of section 2 of the Twenty-First Amendment. *Bacchus* at 281.

A legislative history of the Twenty-First Amendment suggests that the Senate considered the question of 'states rights' relative thereto in great detail. *324 Liquor Corp.* at ____. Taking notice of the evisceration of a proposed section 3 to the amendment which would have granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor, the Court has noted that those "Senate discussions clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor." *Id.*

The broad grant of express authority to the states in section 2 of the Twenty-First Amendment leaves to the states the power to determine the manner of transportation or importation of liquor into each state, including complete prohibition of alcoholic beverages within a state. The purpose of this constitutional amendment to specifically transfer this authority from the federal government to the states is clear from the Senate's debate concerning same.

As consistently held by this Court, "[the Twenty-First Amendment] bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945); *Cf. Nippert v. Richmond*, 327 U.S. 416, 425, n. 15 (1946). The

Court further noted in *324 Liquor*, "just two Terms ago we took occasion to reiterate that a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964); *See State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Zifferin, Inc. v. Reeves*, 308 U.S. 132 (1939); *California v. Washington*, 358 U.S. 64 (1958); *Cf. Indianapolis Brewing Co. v. Liquor Comm'n*, 305 U.S. 391 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939)." 384 U.S., at 41-42.

B. Total Prohibition by State Sanctioned by the Twenty-First Amendment.

Given the unambiguous language of section 2, the Court has ruled that a total prohibition of alcoholic liquors by a state under this constitutional provision would not violate the commerce clause. *Hostetter* at 330. Surely, a state acts within its constitutional authority in promulgating a statute such as Connecticut's affirmation law with clearly a lesser degree of regulation than total prohibition. *Bacchus* at 283.

This Court has further stated that it is well established that a state has broad power under the Twenty-First Amendment "to regulate the times, places and circumstances under which liquor may be sold", *New York State Liquor Authority v. Bilanca*, 452 U.S. 714 (1981); *See also Duran v. Salem, Inc.*, 422 U.S. 911 (1975); *Zifferin, Inc. v. Rives*, 308 U.S. 132 (1939); *California v. LaReau*, 409 U.S. 109 (1972). As noted in the District Court's decision, section 2 of the Twenty-First Amendment "grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *John F. Healy v. The Beer Institute*, 669 F.Supp. -549, (1937) (hereinafter *Healy II*); *See also California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

The District Court correctly concluded that because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulations are within a state's

authority, *Id.; see also State Board of Equalization v. Young's Market Company*, 299 U.S. 59, 62-63 (1936), although under traditional commerce clause limitations it could not ban the sale of other products: *See Baldwin v. G.A.F. Seelig, Inc.* (hereinafter "Seelig"), 294 U.S. 511. Likewise, a state would not necessarily be free to impose similar restrictions with respect to milk. *Healy II*, 599; *see also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

C. Exception to Normal Operation of Commerce Clause.

Nevertheless, as the Supreme Court observed in *Craig v. Boren*, 429 U.S. 190 (1976), "this court's decision . . . (has) confirmed that the (Twenty-First Amendment) primarily created an exception to the normal operation of the Commerce Clause," *Id.* at 206.

Since its adoption, the Twenty-First Amendment has remained the governing force in granting states the right to regulate the sale of liquor within their borders. As recently as September, 1984, Judge Friendly of the Second Circuit noted:

> "for some of us who were present at the creation" of the Twenty-First Amendment . . . the Twenty-First Amendment was designed to end the "noble experiment" by which the federal government endeavored to control the drinking habits of all citizens and place control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by Section 1, the amendment gives the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had hampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by Section 2 of the Twenty-First Amendment which provides: "the transportation or importation in any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby, prohibited."

Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority, No. 84-7168 (2d Cir. 1984).

D. Analysis of Interaction of Twenty-First Amendment and Commerce Clause Based upon Express Delegation of Power.

The District Court properly concluded that in discussing the Twenty-First Amendment and the commerce clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Healy II* at 550, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, (hereinafter "Brown-Forman"), 476 U.S. 573, 2084 (1986), quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *See Midcal* at 109 (what is required in this area is a pragmatic effort to harmonize state and federal powers).

Applying Justice O'Connor's analysis from the dissent in *324 Liquor Corp.*, the proper inquiry is not whether the State of Connecticut chose wisely in enacting its beer affirmation provisions, nor whether the State's motivation was linked to a "central purpose" of the Twenty-First Amendment. The sole "question is whether the provision in this case is an exercise of a power expressly conferred upon the states by the Constitution," quoting (Stevens, J, dissenting in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 287.)

Appellees maintain that the Twenty-First Amendment does not authorize the states to interfere with commerce in other states. As the District Court correctly found, and as discussed herein, Connecticut's affirmation statute does not in any way interfere with commerce in other states. Appellees' claims to the contrary are spurious. Thus, notwithstanding Appellees' wishes to the contrary, the Twenty-First Amendment has a direct bearing in affirming the constitutionality of Connecticut's beer affirmation statutes. The Twenty-First Amendment cannot be argued away.

II. CONNECTICUT'S AMENDED BEER AFFIRMATION STATUTE WITHSTANDS SCRUTINY UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. Presumption of Validity and An Exercise of An Appropriate Level of Judicial Restraint Relative to Connecticut's Beer Affirmation Statute.

In contemplating whether a statute, such as Connecticut's beer affirmation statute, is constitutional, legislation is presumed constitutional unless clearly shown not to be so. *United States Brewers Association v. Healy*, 669 F.Supp. at 548-549.

As the District Court correctly concluded, judges should not, in the exercise of the judicial function, undertake to second guess the political judgment of legislatures. *Healy II* at 548. Thus, the District Court held that judges *must* [emphasis added] refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *Id.* This comports with a great volume of cases where the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. *Hodel v. Indiana*, 101 S.Ct. 2376 (1980). Moreover, every reasonable presumption must be indulged in favor of the validity of a statute. *Home Tel. & Tel v. Los Angeles*, 211 U.S. 265 (1908). Where a relationship exists between a statute and its articulated objectives or purposes, it is not the function of the judiciary to challenge the wisdom of a state statute. *Norfolk Southern Corp. v. Oberly*, 822 F. 2d 388 (1987). The District Court both recognized the presumed validity of Connecticut's beer affirmation statute and exercised an appropriate level of judicial restraint in upholding same.

Dating back to 1952, the Supreme Court noted "we do not sit as a super legislative to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends

the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Additionally, in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), (hereinafter *Seagram*) the Supreme Court found that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws . . . it is up to the legislature, not the courts to decide on the wisdom and utility of legislation." *Id.* at 47; *Ferguson v. Skrupa*, 372 U.S. 726, 728-730 (1963). This is consistent with the Court's inclination to adhere to principles of judicial restraint.

As the Court noted in *Vance v. Bradley*, 440 U.S. 93, 112 (1979), "when the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . no less than debates over the wisdom of other socioeconomic legislation . . . are not to be carried out in the federal courts." As recently as 1987, the court reaffirmed this position: "the Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second guess the empirical judgments of lawmakers concerning the utility of legislation'. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679; *see also, CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

In short, "[a] law can be both economic folly and constitutional." *CTS Corp.*, 107 S.Ct. at ____. Of at least equal significance, Connecticut's affirmation law comports with the Supreme Court's dispositive ruling on liquor affirmation legislation in *Seagram*.

B. Stare Decisis in Seagram Substantiates The Constitutionality and Validity of The Connecticut Affirmation Statute.

In *Seagram*, the Supreme Court upheld the constitutionality of a New York posting and affirmation statute far more restrictive than the statute at issue. The New York statute in that case required that the monthly price schedules for sales to wholesalers and retailers, as filed with the New York State

Liquor Authority, be accompanied by an affirmation that "the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. *Seagram* at 39-40.

In upholding the constitutionality of the New York law, the Court noted that the case concerned liquor "destined for use, distribution, or consumption in the state of New York." *Id.* at 42. The Court held that "the Twenty-First Amendment demands wide *latitude* [emphasis added] for regulation by the state." *Id.*

The Court reasoned that New York could "constitutionally insist" that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43. Holding for the state, the Court added that the Appellant's argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not with the domain which the Constitution forbids." *Id.* at 43. As in *Seagram*, Appellants in this appeal assert alleged economic injury that calls for conjecture and speculation.

In *Seagram*, this Court declined to strike down a New York statute because, among other reasons, the Appellants in *Seagram* had failed to demonstrate quantified economic harm. The Appellees in this appeal appear before this Court, more than twenty years later, making the same claims of theoretical and speculative economic injury. As in *Seagram*, Appellees ask this Court to strike down an affirmation statute based on "conjecture." For the reasons stated in *Seagram* alone, Appellees' challenges, based on speculative economic harm, should be dismissed.

Seagram has never been overruled and is both stare decisis and the dispositive statement on state liquor affirmation provisions. If it has been somewhat modified by the Supreme

Court in *Brown-Forman*, said modifications have no effect on the constitutionality of the Connecticut affirmation statute under the strict limitations set forth therein.

C. Connecticut's Beer Affirmation Statute Is Constitutionally Valid on Its Face.

In *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573, (1976), Justice Marshall suggested that the Court "has adopted what amounts to a two-tiered approach to analyzing state economic legislation under the Commerce Clause" 106 S.Ct. at 2084. Under the two-tier criteria established under *Pike v. Bruce Church, Inc.*, (hereinafter "*Pike*"), 397 U.S. 137, 142 (1970), the 'per se' invalid prong of the test examines whether a state statute directly regulates or discriminates against interstate commerce or in effect favors in-state economic interests over out-of-state economic interests. A statute that directly regulates or discriminates against interstate commerce would be struck down "per se" without further inquiry. *Id.*

The District Court applied the "per se" standard enunciated in *Brown-Forman* to Connecticut's affirmation statute and correctly found that the statute did not directly regulate or discriminate against interstate commerce. *Healy II*, at 553. Under the current Connecticut law, shippers must post their price schedule, hold it for the next full month, and affirm that the price, *at the time of posting* [emphasis added], is no higher than the lowest price offered to wholesalers in other states bordering Connecticut. Conn. Gen. Stat. Section 30-63b(b). Since posting occurs at a precise moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way inhibit price changes by an out-of-state shipper at any time. Moreover, Conn. Gen. Stat. Section 36-63b(e) specifically provides:

> This section (affirmation) shall not prohibit a manufacturer or out-of-state shipper permittee or the

authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any such time during the calendar month covered by such posting.

Clearly a price change by a shipper in another state is not a violation of Connecticut law. The Connecticut statute does not prohibit price changes in other states, nor purport to influence or regulate prices in other states. In fact, the Connecticut statute expressly invites out-of-state shippers to change prices in other states at any time. *See* Conn. Gen. Stat. Section 30-63b(e). This eliminates the Appellees' argument that Connecticut law facially manifests an impermissible extraterritorial effect as further discussed infra. Indeed, at one time, Appellees in the pending case withdrew their argument on this point. *Healy II at* ____.

Moreover, there is no possibility that Connecticut's affirmation law regulates prices in other states. This is in contrast to the Court's finding that the New York ABC law, struck down in *Brown-Forman*, had an overall effect to directly regulate prices in other states.

For instance, if the lowest price for a case of X brand beer in New York, Rhode Island, and Massachusetts is $10.00 at 10:00 a.m. on January 6 (time of posting in Connecticut; *See 7 Reg. Conn. Agencies, Liq. Cont.* Sec. 30-6-B4a), then the price for that same item in Connecticut must be affirmed at $10.00 or less for sale in Connecticut under Connecticut law. If at any time subsequent to that posting, the price of a case of X brand beer is changed to $9.00 in one of the border states, Connecticut law is not violated, nor does it prevent such a price change in another state.

Appellees maintain that Connecticut law prevents brewers from changing their prices in Massachusetts, New York and Rhode Island. It is not Connecticut law that prevents a price

change, although there may be restrictive laws or regulations within those other states which prevent such changes.

The District Court correctly concluded that "under *Seagram*, Connecticut's affirmation statute is facially valid" because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. *Healy II*, 669 F.Supp. at 553.

Connecticut's beer affirmation law also does not discriminate by favoring in-state economic interests over out-of-state interests. Connecticut's Posting and Affirmation statutes are designed in such a way that the wholesaler, retailer and consumer pay prices that are fair and competitive with their counterparts in border states. Furthermore, Connecticut's law does not protect in-state industry at the expense of out-of-state industry, because Connecticut has no in-state brewers. Cf. *Seelig*.

The Sixth Circuit has recently upheld the constitutionality of a liquor affirmation statute on its face and as applied, similar to the Connecticut statute. In *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission*, Nos. 87-5870/87-5913, slip op (6th Cir. Nov. 4, 1988), the Court upheld the constitutionality of Tennessee's liquor affirmation law – a law similar to Connecticut's affirmation law which is at issue in this appeal.

The Tennessee law was challenged on the grounds that the practical effect of the law was to control liquor prices in other states. The Tennessee law, like Connecticut's, is a liquor affirmation statute which requires that a manufacturer of alcoholic beverages may not charge or quote a price that is higher than any wholesale price currently charged by the manufacturer in any other state. The Tennessee statute is arguably more onerous than the Connecticut law in that the Tennessee law references prices nationwide, while the Connecticut statute only references Connecticut's border states. The Sixth

Circuit Court of Appeals found that Tennessee's affirmation law did not make price changes in other states illegal nor purport to regulate prices in other states. The Sixth Circuit consequently found that the Tennessee statute is constitutional. The Sixth Circuit reasoned that although the Tennessee statute may arguably discourage out-of-state price reductions in that such price changes must be replicated in Tennessee, the statute is constitutional because it does not prohibit price changes in other states. *Brown-Forman v. Tennessee*, at . Thus the Court found that while the statute may have an indirect effect on manufacturers' profits in the interstate market, the statute does not prompt price changes in any other state and consequently does not directly regulate interstate commerce. *Brown-Forman v. Tennessee*, at . Similarly, Connecticut's affirmation law should be upheld in that the statute does not make price changes in other states illegal nor purport to regulate prices in other states. Conn. Gen. Stat. Section 30-63b(3).

The Sixth Circuit also found that any effect on interstate commerce resulting from an affirmation statute that purports to prohibit discriminatory prices is certainly less onerous than an absolute prohibition on the sale of liquor as sanctioned by the Twenty-First Amendment. *Brown-Forman v. Tennessee* at . Further, the court found that such interstate effects do not necessarily invalidate a statute, especially when the products come within the purview of the Twenty-First Amendment. *Id.* at , citing *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978).

Similar to the statute upheld by the Sixth Circuit, the Connecticut statute does not prohibit price changes in neighboring states. The Sixth Circuit therefore correctly concluded, as the Second Circuit should have concluded, that while such an affirmation statute may incidentally and indirectly affect the interstate liquor market, such statutes do not constitute "regulation" of liquor prices in other states.

Connecticut's legislation treats all brewers equally, so that no particular brewer, and no one particular state, is dispropor-

tionately affected by these statutes. Connecticut simply places upon all brewers desiring to sell their products in Connecticut a uniform element of market price competition, without regulating interstate prices. The state's beer affirmation statute is therefore facially valid.

D. Connecticut's Beer Affirmation Statute Is Constitutional as Applied in That it Places Only Incidental and Indirect Burdens on Interstate Commerce.

The District Court also correctly found that, in addition to being facially valid, Connecticut's beer affirmation statute passed muster under the second prong of the *Pike* two-tier standard which balances the local benefits of a statute against any indirect burdens on interstate commerce. Simply stated, "the critical consideration – under either test, is the overall effect of the statute on both local and interstate activity". *Brown-Forman*, 106 S.Ct. at 2084.

The District Court correctly discounted the Appellees' assertions that some business of Connecticut residents previously going to border state retailers would shift to Connecticut retailers and found that "some artificially" high prices (in the border states) and/or "artificially" low prices that result in Connecticut from beer price affirmation would not render the statute unconstitutional. In fact, quite to the contrary, the District Court noted that the Supreme Court has held that a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43; *Healy II*, 669 F.Supp. at 553.

A "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from predominantly out-of-state industry to a predominantly in-state industry," *Healy II*. 669 F.Supp. at 553, quoting *Minnesota v. Cloverleaf Creamer Company*, 449 U.S. 456 (1981). In effect, the District Court found that the

disincentive to Connecticut consumers to buy outside the state (never quantified by the Appellees nor shown to be of more than minor economic significance) and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut, are not excessive burdens or intrusions on commerce, *Healy II*, 669 F.Supp. at 553. In effect, the District Court found that there was an insignificant and indirect extraterritorial effect on interstate commerce.

Furthermore, the District Court held that "because Connecticut's statute operates even-handedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits." *Id.* The Connecticut statute thereby withstands constitutional scrutiny under the second tier balancing test of the *Pike* analysis.

The District Court's opinion relative to the second tier of the *Pike* test is supported by the Sixth Circuit's decision in *Brown-Forman v. Tennessee*. In applying the *Pike* balancing test to the Tennessee Liquor Affirmation Statute, the Sixth Circuit appropriately found that while the Tennessee statute may require a manufacturer to raise prices in other states in order to effectively raise prices in Tennessee, "it is by no means clear . . . that [Tenn. Code Ann. Section 57-3-202(e)] must inevitably produce higher prices in other States . . . rather than the lower prices sought for Tennessee." *Brown-Forman v. Tennessee* at p. , paraphrasing *Joseph E. Seagrams & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966). The Sixth Circuit, in balancing Tennessee's legitimate state interest against theoretical and unquantified effects on the interstate liquor market, found that Appellants had never produced evidence of the alleged market distortions or effects on prices in other states. Similarly, the Appellees-Brewers in this appeal have never produced a scintilla of evidence supporting their claims of market distortions or disadvantages suffered by out-of-state

consumers as a result of the Connecticut affirmation statute. Despite countless opportunities in the course of the myriad of litigation on liquor affirmation statutes, the brewers and out-of-state shippers have never quantified or demonstrated any quantifiable economic harm from liquor affirmation.

In short, the Connecticut statute is constitutional under the *Pike* balancing test. Connecticut's numerous state interests discussed supra, clearly outweight the incidental and indirect burdens on interstate commerce and speculative and theoretical alleged economic harm.

E. The Amended Connecticut Affirmation Statute Eliminates Extraterritorial Effects.

The District Court was correct in concluding that the Connecticut statute does not directly regulate or discriminate against interstate commerce. *Healy II*, 669 F.Supp. at 533. Since posting in Connecticut occurs at a moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way influence or inhibit price changes by out-of-state shippers at any time.

Notwithstanding these distinctions, the Appellees argued, and the Second Circuit Court of Appeals ruled, that an impermissible extraterritorial effect remains apparent on its face because brewers are in fact not free to change prices in other states due to regulatory restrictions in those other states. Citing the monthly price hold laws in Massachusetts, 138 M.G.L.A. Sec. 25B(d), and the 180 day hold on price reductions mandated by New York law, N.Y. Alco Bev. Cont. Law Sec. 55(2) (McKinney 1987), the court found that brewers must still look ahead to consider the impact of their pricing decisions in Connecticut when making pricing decisions in Massachusetts and New York. *Healy II*, F.2d ____ App.

It is well settled that the practical effect is a critical element in determining whether an affirmation statute is 'per

se' invalid under the Commerce Clause. In applying the *Pike per se* analysis to an affirmation statute, courts have considered whether the statute escapes the state borders to control liquor prices in other states. *Brown-Forman*, 476 U.S. at 583 citing *Southern Pacific Co. v. Arizona*, 335 U.S. 761, 775 (1945). However, in this case, Connecticut has done all that it can to remove the extraterritorial effect of its legislation. The Connecticut affirmation provisions do not bar, deter, or delay price decisions in other states. They specifically leave brewers free to select their own price levels in other states. The fact that there are regulatory restrictions on price changes in other states is a matter beyond Connecticut's control.

Connecticut eliminated extraterritorial effects of the affirmation statute by enacting the amended affirmation provisions which invite the brewers to change prices in other states at any time. Unlike the New York law in *Brown-Forman*, it is not a violation of the Connecticut statute to change prices in any other state at any time. Nor does Connecticut attempt to influence prices or pricing decisions in other states. Connecticut merely guarantees its residents the lowest price among the border states at an exact moment in time. Any extraterritorial effect is thereby eliminated. Apparently in deference to this logic, Appellees-Brewers at one point withdrew argument on this point. *Healy II*, ____ F.2d ____. App.

This position is consistent with a recent Supreme Court decision concerning an Indiana tender offer statute. In *CTS Corporation v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987), (hereinafter "CTS"), the Court held that as long as the state only regulated Indiana corporations, the Commerce Clause was not violated. 107 S.Ct. at 1649. The Court went on to discuss the Court of Appeals' analysis relating to balancing the state and federal interests. Rather than engage in a true balancing analysis, the Supreme Court simply suggested that the substantial and legitimate state interest in regulating corporate governance was permissible and emphasized that courts should exercise judicial restraint in evaluating the wisdom of state laws that may have some impact on interstate commerce.

> The Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation. 107 S.Ct. at 1651.

The *CTS* opinion bears significantly on this case for two reasons. First, it indicates that the Court has employed a more limited method for evaluating Commerce Clause challenges. By focusing on protectionism, the Court has eliminated *ad hoc* balancing analyses that must inevitably weigh the incidental burdens of state legislation on interstate commerce.

Second, given the focus in *CTS* on protectionism, and away from the extraterritorial effects that frequently accompany state legislation, the opinion suggests that courts should defer more frequently to a state's legitimate and constitutional exercise of power. To the extent that state discriminatory intent is proscribed by the commerce clause, federal courts consequently should not engage in evaluating the wisdom of state policies simply because they have some incidental interstate impact.

F. Connecticut Maintains a Plethora of Legitimate State Interests to Regulate the Distribution of Alcohol within its Borders.

Despite voluminous litigation involving Connecticut's Liquor Control Act, Appellees have never provided reasoning as to why prices should be substantially lower in three border states than in Connecticut, or conversely, why they should be much higher in Connecticut than in the border states. Connecticut maintains a plethora of legitimate state interests to regulate importation, distribution and sale of alcoholic liquor within its boundaries, not the least of which is insuring that Connecticut wholesalers and retailers be treated equally by receiving the same prices as their neighbors across state lines. Because the Connecticut law allows brewers to

reflect additional shipping and tax costs in determining the affirmed price, there is no valid reason why brewers should charge more in Connecticut than in its three border states.

Connecticut does not seek to dictate the prices at which the brewers offer their products. Connecticut is simply insisting that its wholesalers be placed on an equal footing with wholesalers in the border states, and that they not be singled out to subsidize lower prices charged by brewers in these border states. This is similar to the mandate which seventeen "control" states with state-run liquor retail operations have given to national liquor distillers and importers. *See Seagram, supra.*

The Twenty-First Amendment does not grant additional legislative authority to a state simply because it declares itself to be a market participant, as the several so called "control" states. Conversely, a state and its consumers should not be penalized for its failure to do so.

It is fundamental economics that if brewers charge artificially low prices in certain arbitrarily privileged states, they will charge comparably higher prices in other states in order to achieve targeted profit margins. Acknowledging this inevitable market price discrimination, Connecticut has sought only to insure that its consumers will not be subsidizing the lower prices being charged to consumers in bordering states.

Additionally, there is no constitutional right to engage in the sale of alcoholic liquors, and alcoholic liquors are clearly distinguishable from other consumer products, such as milk. See discussion of Twenty-First Amendment, *supra.*

Furthermore, markets and distribution channels involving alcoholic liquors are heavily regulated and to a great extent protected through this state-by-state licensing system. Unlike other industries, an upstart brewer/importer could not simply begin operation by manufacturing and distributing its products in the United States without first applying to and

being approved by appropriate state and federal regulatory authorities. Thus, there are market entry barriers resulting from the licensing system which serve to artificially protect industry-wide giants, such as many of the appellees in this action, from competition.

Connecticut has a legitimate state interest in maximizing sales within its own borders in order to increase its tax revenue. Increasing state revenue is particularly important in Connecticut, where there is no state income tax, and the state must rely on a sales tax, and on such taxes as those imposed on alcohol, to fund the state budget. Furthermore, highway safety must be considered a unique factor with regards to traveling across state lines to purchase intoxicating alcohol. The state has a legitimate interest in trying to curtail buying patterns that could lead to increased danger on the highways.

There are some state activities which have been held invalid under the Commerce Clause. For example, in *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), the State of New Jersey attempted to prevent out-of-state shippers from depositing their garbage in New Jersey landfills, while granting the New Jersey sources of garbage preferential treatment in being admitted to their landfill sites. In order to adjudge a state law infirm under the commerce clause, the Court stated that "what is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id* at 628.

Connecticut's affirmation law does not isolate Connecticut from its border states, but rather insures that the state is treated in harmony with neighboring states. Rather, Connecticut's affirmation statute insures that Connecticut is not "isolated" or targeted to pay higher prices to subsidize prices charged in the border states. In a similar vein, the Connecticut legislature solely seeks to have its wholesalers, retailers and consumers treated in parity with their counterparts in its neighboring states.

In short, the Commerce Clause does not prohibit a state from enacting reasonable legislation to protect the economic interests of its citizens, even if such legislation incidentally affects interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 624, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

III. CONNECTICUT'S BEER AFFIRMATION STATUTE IS IN HARMONY WITH BOTH THE TWENTY-FIRST AMENDMENT AND THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. The Markets within the National Liquor Distribution System.

The Twenty-First Amendment has mandated the creation of fifty state markets which have been established along geographic boundaries. As the District Court noted, "market areas do not always coincide with state borders." *Healy II*, 669 F. Supp. at 546.

For example, when brewers and importers establish prices in New York state, under the existing liquor distribution system, wholesalers throughout the entire state benefit from New York City's market concentration. A Connecticut wholesaler in Bridgeport, Connecticut, approximately 50 miles from New York City and arguably serving the same market as New York

City, under the scheme advocated by Appellees would not have the benefit of the indigenous competitive forces at work within this market. Ironically, a Connecticut wholesaler may be arbitrarily placed at a competitive disadvantage with respect to a counterpart in Westchester, New York. Higher prices charged to a Bridgeport wholesaler would in effect subsidize lower prices charged to a wholesaler far removed geographically from this market, for example in Lake George, New York. A wholesaler in Lake George, New York, which by market standards would not maintain any legitimate "competitive advantage," over a wholesaler in Bridgeport, Connecticut consequently benefits by New York state law which ties New York City prices to Lake George prices.

In short, the existing national liquor distribution system as regulated on a state-by-state basis is not a free market and does not afford unregulated price competition.

B. Avoidance of Institutionalization of Price Discrimination through Misapplication of The Twenty-First Amendment.

As proposed by Appellees, the institutionalization of arbitrary price discrimination along state borders would turn federalism on its head by using "federal" commerce clause principles to institutionalize state-by-state price discrimination. This perverse manipulation of the national liquor distribution system would in effect ordain each brewer or importer as an independent sovereign relative to a captive market involving the establishment of pricing policies in each state. Given that some states are themselves market participants with significant purchasing power, pricing decisions relative to non-control states would inevitably be distorted.

If the pricing system proposed by Appellees were adopted, it might have ironic consequences for the Appellees, for it is entirely conceivable that each of the fifty states would evolve into a control state in order to establish equitable pricing poli-

cies for its consumers. At the very least, the inequities of the proposed system are readily evident through application in a state such as New York, as opposed to its neighbor, Connecticut.

Short of restructuring the entire national liquor distribution system through repeal of the Twenty-First Amendment, Appellees are attempting to permanently affix arbitrary (or as the District Court noted, "artificial") market boundaries along state borders. As discussed, liquor markets within states become protected markets by virtue of the operation of state regulatory mechanisms enacted under the Twenty-First Amendment. Appellees are seemingly attempting to institutionalize interstate "competition" based upon intrastate uniform price-fixing. This would be inappropriate on its face under the commerce clause were state boundaries to actually constitute markets. It is preposterous given the reality of radically different market concentrations within each state.

For example, the same price for beer is charged to wholesalers in Lake George and New York City, despite a substantially different market concentration in New York City. The Lake George market, and other markets in the state of New York, are therefore protected by the single price posting mechanism established by the State of New York. The price posted in New York State consequently has no relation to what a competitive market would dictate were the distribution of alcoholic liquors treated similarly to distribution of other products such as milk. Thus wrapped within the veil of sanctimonious commerce clause arguments, Appellees attempt to institutionalized arbitrary price discrimination along state geographic borders. The Connecticut affirmation statute exposes and ultimately eliminates the price discrimination advocated by Appellees by ensuring fair and evenhanded pricing to Connecticut's wholesalers. Connecticut's affirmation laws thereby enhance both the spirit and intent of the Commerce Clause.

C. The Connecticut Affirmation Statute Is in Harmony with Both The Twenty-First Amendment and Commerce Clause.

Exercising its authority under section 2 of the Twenty-First Amendment, Connecticut has attempted to inject competition and market pricing into the regional market by guaranteeing evenhanded treatment to its wholesalers. While the Twenty-First Amendment eliminates free market pricing between states, Connecticut's statute establishes equal footing between wholesalers in Connecticut and wholesalers in its border states, thereby eliminating artificially high prices charged to Connecticut wholesalers.

The Connecticut affirmation statutes effectively operate to enhance the Connecticut wholesaler's ability to compete by requiring a level economic playing field. Given a consumer's ability to purchase alcoholic liquor at retail outlets wherever he or she wishes, a Connecticut wholesaler that is arbitrarily charged higher prices than his counterparts in neighboring states, regardless of inclusion in certain metropolitan markets, would face inherent institutional price discrimination.

Because there is no effective way to compete with institutionalized discounts to wholesalers in border states, Connecticut wholesalers would simply have to accept the brewers or importers fiats of appropriate prices for its "Connecticut" market and thereby inevitably suffer arbitrarily higher prices than wholesalers in, for example, the New York "market", putting Connecticut wholesalers *a priori* at a disadvantage without any opportunity to compete. The pricing schemes advocated by the brewers and importers would ultimately institutionalize permanent economic injustice by mandating arbitrary price discrimination.

In effect, Appellees are advocating the institutionalization of pricing mechanism which smack of the failed economics of centralized economic planning. Given targeted profit mar-

gins, and institutionalized state markets with no effective competition possible between states, certain states and its consumers would be relegated to a permanent status of price discrimination relative to alcoholic beverages. Such a result was certainly not contemplated by those who passed the Twenty-First Amendment. Additionally, a chorus of litigation would inevitably follow. For each state's liquor provisions would be exposed to attack under the commerce clause through alleged institutionalization of statewide pricing mechanisms resulting in impermissible extraterritorial effects in other states, such as Connecticut. A whole new chapter of constitutional challenges would inevitably be opened were Appellees upheld.

If the Appellees in this case wish to restructure the national liquor distribution system through repeal of the Twenty-First Amendment, they certainly possess the economic resources to mount such a challenge through the legislative process. That would be more appropriate than continuous recourse to the judiciary. In any event, it seems that their efforts in this matter are misapplied against a Connecticut beer affirmation statute which seeks to promote both Twenty-First Amendment and Commerce Clause principles by allowing the state to regulate the importation and distribution of alcoholic beverages within its borders while at the same time enhancing fair competition and prohibiting the institutionalization of arbitrary price discrimination.

CONCLUSION

The Twenty-First Amendment sanctions Connecticut's Liquor Control Act including its affirmation provisions.

Connecticut's amended beer price affirmation provisions are constitutional under the commerce clause. This court should exercise an appropriate level of judicial restraint in upholding the Connecticut Statute. Moreover, *Seagram* is stare decisis in upholding the validity of the Connecticut statute. Connecticut's statute is facially valid uner the *Pike* "per se" standard and withstands constitutional scrutiny under the *Pike* balancing test. The amended Connecticut statute eliminates extraterritorial effects. Balancing the plethora of legitimate state interests served by the Connecticut statute against the indirect and incidental burdens on interstate commerce, the Connecticut statute clearly withstands constitutional scrutiny under the commerce clause.

The Connecticut statute is in harmony with both the commerce clause and the Twenty-First Amendment. The Connecticut statute avoids the institutionalization of an artificial and discriminatory pricing system as advocated by the Appellees and instead legislates evenhanded competition.

For all the foregoing reasons, we respectfully request that the Court enters an order summarily reversing the decision of the United States Court of Appeals for the Second Circuit and affirming the judgment of the United States District Court for the District of Connecticut. In the alternative, if appropriate, we urge the Court to reverse the decision of the U.S. Court of Appeals for the Second Circuit and remand this case to the lower court on the sole issue of the constitutionality of the Connecticut statute as applied.

Respectfully submitted,

Wine and Spirits Wholesalers of Connecticut, Inc.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191

December 29, 1988